IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 5132 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

1 & 2 YES; 3 to 5 NO

K C SETHI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 5132 of 2002

MS. KRUTI M SHAH for MR MP SHAH for Petitioner No. 1

MR MA BUKHARI APP for Respondent No. 1

..... for Respondent No. 2

CORAM : MR.JUSTICE D.H.WAGHELA

Date of decision: 25/09/2002

C.A.V. JUDGEMENT

1. This petition moved under Section 482 of the

Criminal Procedure Code, 1973 ('the Cr.P.C.' for short) prays quashing of the Criminal Complaint No.6690 of 1997 pending in the Court of the learned Judicial Magistrate, First Class, Pardi. The said complaint alleges against the accused, a company and the present petitioner, the offence under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 ('the Act' for short). The earlier attempt of the petitioner at discharge through the application at Exh.13 has failed, by virtue of the order dated 3.1.2002 of the learned Judicial Magistrate, First Class, Pardi.

2. The prima facie record of facts as revealed in the aforesaid order below Exh.13 and about which there is no controversy at this stage is such that the petitioner had drawn three cheques dated 30.7.1997, 31.8.1997 and 6.9.1997 in favour of the complainant and the same were dishonoured on account of the payment having been stopped by the drawer. Therefore, the complaint was filed after service of the demand notice dated 12.11.1997. It was the case of the petitioner that he had retired as director of the accused No.1 Company and that he was implicated as the director of the drawer Company; but he was not in charge of or responsible to the Company for the conduct of its business at the time the offence was committed. It was contended that, due to internal disputes within their company, he was prevented from attending to the affairs of the company from the second week of October, 1997. The cheques were dishonoured by the bank on 19.10.1997 on the ground of the payment having been stopped by the drawer. The petitioner had sought to resign by his letter dated 27.10.1997. Even that resignation letter at Annexure-E to the petition stated that he should be taken as having retired with effect from 5.11.1997.

3. Elaborating her arguments on the above facts, the learned counsel for the petitioner submitted that, as laid down by the Supreme Court in K.BHASKARAN v. SHANKARAN VAIDHYAN BALAN [AIR 1990 SC 3762], the offence under Section 138 of the Act can be completed only with the concatenation of a number of acts which includes failure of the drawer to make payment within 15 days of the receipt of the notice. It was, on that basis submitted that in the facts of the present case, at the time the statutory notice was received and 15 days thereafter had expired, the petitioner was no longer on the board of directors of the company as he had already retired or been removed from the company. It was accordingly argued that at the time some of the essential events to constitute the offence had happened, or, in

other words, on the date when the offence can be said to have been completed, the petitioner was neither in charge of the accused company, nor a director of it.

3.1 The learned counsel also relied upon the judgment of the Supreme Court in K.P.G. NAIR v. JINDAL MENTHOL INDIA LTD. [2000 (6) SCALE 578] to submit that the allegation in the complaint that the accused was in charge of and was responsible to the accused Company for the conduct of its business was essential; and, in absence thereof, he was entitled to be discharged. The K.P.G.NAIR's case (supra) and its ratio are evidently based upon a different factual premise in which the petitioner had not himself signed the cheque and he was

sought to be prosecuted as he happened to be the director of the accused company at one point of time. Similarly, the judgment of this Court in ALKA N. SHAH v. STATE OF GUJARAT [2001 (2) G.L.R. 1023], relied upon by the petitioner, is on such different foundation of facts in which cheques were dishonoured and demand notice was served in November and December, 1999 whereas the applicant had resigned both as Director and Managing Director of the company as early as in January, 1999.

3.2 The petitioner's contentions were based upon the premise that he was implicated in his capacity of the erstwhile chairman/director of the company and as though the facts about the alleged internal dispute within the company, which were yet to be proved and which might or might not be available in defence, could be considered to quash the complaint against him. Prima facie, the petitioner was liable to prosecution and expressly implicated primarily as the person in charge of and responsible to the company for the conduct of its business. The very fact that he had admittedly signed the cheques for and on behalf of the Company in his capacity as the chairman or director of the Company was itself sufficient to assume that he was, prima facie, in charge of the Company.

3.3 It was, therefore, argued that the offence under Section 138 of the Act consisted of five components and could be said to have been completed only when the last

of the events, i.e. failure to pay within fifteen days of receipt of the notice, happened; and the petitioner was not in charge of or responsible to the company at that stage. It must, however, be noted that the five acts which are described as components of the offence

under Section 138 in K. BHASKARAN (supra) are discussed therein in context of the controversy about territorial jurisdiction of the Court.

4. The provisions of Section 138 and Section 141 of the Act read as under:

"S.138 Dishonour of cheque for insufficiency, etc. of funds in the account-

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

"S.141 Offences by companies -

(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly'

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other office shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation- For the purposes of this section-

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm."

4.1 Evidently, the gist of section 138 is that the drawer of the cheque shall be deemed to have committed an offence when the cheque drawn by him is returned unpaid on the prescribed grounds. The conditions precedent and the conditions subsequent to constitute the offence are

drawing of a cheque on the account maintained by the drawer with a banker, presentation of the cheque within the prescribed period, making of a demand by the payee by giving a notice in writing within the prescribed period and failure of the drawer to pay within the prescribed period. Upon fulfilment of these requirements, the commission of the offence -which may be called the offence of 'dishonour of cheque'- is complete. If the drawer is a company, the offence is primarily committed by the company. By virtue of the provisions of sub-section (1) of section 141, the guilt for the offence and the liability to be prosecuted and punished shall be

extended to every person who, at the time the offence was committed, was in charge of and was responsible to the company for the conduct of its business; irrespective of whether such person is a director, manager, secretary or other officer of the company. It would be for such responsible person, in order to be exonerated in terms of the proviso, to prove that the offence was committed without his knowledge or despite his due diligence.

4.2 Under the separate provision of sub-section (2), if it is proved that the offence was committed with the consent or connivance of or was attributable to the neglect on the part of any director, manager, secretary or other officer of the company, such person would also be deemed to be guilty. Obviously, the burden of alleging and proving consent, connivance or neglect on the part of any director etc. would rest upon the complainant. The non-obstante clause with which sub-section (2) opens indicates that the deeming provision is distinct and different from the deeming provision in sub-section (1) in which the office or designation of the person in charge of or responsible to the company for the conduct of its business is immaterial.

4.3 While the essential element for implicating a person under sub-section (1) is his being in charge of and responsible to the company in the conduct of its business at the time of commission of the offence, the

emphasis in sub-section (2) is upon the holding of an office and consent, connivance or negligence of such officer irrespective of his being or not being actually in charge of and responsible to the company in the conduct of its business. Thus, the important and distinguishing feature in sub-section (1) is the control of a responsible person over the affairs of the company rather than his holding of an office or his designation

while the liability under sub-section (2) arises out of holding an office and consent, connivance or neglect. While all the persons covered by sub-section (1) and sub-section (2) are liable to be proceeded against and also punished upon proof of their being either in charge of and responsible to the company in the conduct of its business or of their holding of the office and having been guilty of consent, connivance or neglect in the matter of commission of the offence by the company, the person covered by sub-section (1) may, by virtue of the proviso, escape only punishment if he proves that the offence was committed without his knowledge or despite his due diligence.

4.4 As for the requisite evidence, the burden upon the prosecution would be discharged under sub-section (1) when a person is proved to be in charge of or responsible to the company in the conduct of its business and would shift upon the accused to prove that he was ignorant or diligent, if that be his defence; whereas under sub-section (2) the prosecution would be required to

allege and prove the consent, connivance or neglect and holding of the office by the accused. There is nothing to suggest that the same person cannot be made to face the prosecution either under sub-section (1) or sub-section (2) or both. A director or manager can be arraigned and proved to be guilty as the person in charge of and responsible to the company as well as the director of the company who, as such, might have consented to, connived at or been negligent in respect of the offence of dishonour of cheque committed by the company. It can, therefore, be logically deduced that a person can be arraigned in a complaint as the accused along with the company if it prima facie appears that he was in charge of and responsible to the company for the conduct of its business, although he may or may not be or may not have continued to be a director or other officer of the company, as mentioned in sub-section (2). It would be sufficient if the complaint indicates that such person has been arraigned on the basis of averments which disclose him to be the person in charge of and responsible to the company in the conduct of its business at the time the offence was committed. Evidently, a person who signs the cheque or who has the authority to sign the cheque for and on behalf of the company, regardless of his office or capacity, can, prima facie, be assumed to be in charge of and responsible to the company in the conduct of its business. And, where such person is prosecuted, then, if it be his defence that the offence was committed without his knowledge or that he

had exercised all due diligence to prevent the commission of such offence, the burden to prove that would be on him and can only be discharged at the stage of evidence. Accordingly, such plea in defence cannot be a ground for quashing the complaint.

4.5 While dealing with a reference to resolve the apparent conflict between the judgments of the Apex Court in MUNICIPAL CORPORATION OF DELHI v. RAM KISHORE ROHTAGI [(1983) 1 SCC 1] and U.P.POLLUTION CONTROL BOARD v. MESSRS MODI DISTINNERY [(1987) 3 SCC 684], in the context of vicarious liability under the provisions of section 141 of the Act, Their Lordships of the Supreme Court have, in P.RAJARATHINAM v. STATE OF MAHARASHTRA [(2000) 10 SCC 529], pertinently observed as under:

> "4. A bare reading of the provision mandates that some facts must come on the record in order to figure as to who should answer the charge ultimately. Necessarily, pre-charge evidence assumes importance. The complainant will have to put his side of the case as given out in the complaint and the persons summoned would have to put on the record all what is material to extricate themselves out. In any case, the crucial time would be when framing charge whereat a decision in that respect would be required to be made by the court. Presently, it appears to us premature to be resolving the conflict and the ratio deduced thereby, may turn out to be obiter.
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> Therefore, we think that we need not resolve such conflict at present and leave it to the court concerned to pass appropriate orders at the time of framing of charge. In this manner, we dispose of these appeals."

The above discussion and the final word of the Apex Court practically disposes of the controversy presently before this Court in this case.

5. But, an additional issue was raised and requires to be settled insofar as a person is liable to be proceeded against under the provisions of sub-section (1) of Section 141 for being in charge of and responsible to the company "at the time the offence was committed." It would, therefore, be important to find out the "time" when the offence under section 138 can be said to have been committed by the company. It is commonplace that an offence means an aggregate of acts or omissions

which are punishable by law and, therefore, can consist of several parts, each part being committed at different time and place involving different persons. The provisions of Section 138 would require a series of acts of commission and ommission to happen before the offence of, what may be loosely called, "dishonour of cheque" can be constituted for the purpose of prosecution and punishment. It is held by the Supreme Court in K. BHASKARAN v. SANKARAN VAIDHYAN BALAN [(1999) 7 SCC 510] that:-

"14. The offence under Section 138 of the Act can be completed only with the concatenation of a number of acts. The following are the acts which are components of the said offence: (1) drawing of the cheque, (2) presentation of the cheque to the bank, (3) returning the cheque unpaid by the drawee bank, (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice."

Different persons can be in charge of the company when each of the series of acts and omissions essential to complete the commission of offence by the company were being committed. To take an example, in the case of a company, "A" might be in charge of the company at the time of drawing the cheque, "B" might be in charge of the company at the time of dishonour of cheque and "C" might be in charge of the company at the time of failure to pay within 15 days of the receipt of the demand notice. In such a case, the permissibility of prosecution of A, B and C or any of them would advance the purpose of the provision and if none can be prosecuted or punished, it would frustrate the purpose of the provisions of Section 138 as well as Section 141. The key to this interpretation lies in the use of the phrase: "every person.....shall be deemed to be guilty ...and shall be liable to be proceeded against and punished accordingly" as it occurs in sub-section (1) of section

141 and the use of the phrase "provided that nothing contained in this sub-section shall render any person liable to punishment if he proves..." that occurs in the proviso. Every person who was in charge of and was responsible to the company for the conduct of its business at the time any one of the components necessary for the commission of the offence occurred may be "proceeded against", but may not be "punished" if he succeeds in proving that the offence was committed

without his knowledge and despite his due diligence; the burden of proving that remaining on him. Therefore, it also has to be held that the time of commission of the offence of dishonour of cheque cannot be on the stroke of a clock or during 15 days after the demand notice was served, but the time of commission of the offence has to be construed as the time when each of the acts of commission and omission essential to constitute the offence was committed. The word "every" points to the possibility of plurality of responsible persons at the same point of time as also to the possibility of a series of persons being in charge when the sequence of events culminating into the commission of offence by the company were taking place.

5.1 As held by the Supreme Court in ANIL HADA v. INDIAN ACRYLIC LTD. [(2000) 1 SCC 1], the phrase "as well as " used in sub-section (1) of Section 141 of the Act would embroil the persons mentioned therein within the tentacles of the offence on a par with the offending

company. Therefore, when the company is the drawee of the cheque, such company is the principal offender and the remaining persons are offenders by virtue of the legal fiction created by the legislature. When the offence is attributed to a juristic person or a body made up of several individuals and the liability to be prosecuted and punished is extended to embroil by legal fiction certain human beings, that legal fiction has to be so interpreted and applied that the individuals intended to be embroiled may not escape the liability by mere fact of having not been in charge at the time when one or the other of the events essential to complete the offence by the company happened. Borrowing again from K.BHASKARAN (supra), the court should not adopt an interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure.

6. In the facts of the present case, the petitioner who claims to have resigned or retired from the post of director of the accused company claims to be neither a director nor the person in charge of or responsible to the company at the time the demand notice was received by the company, although admittedly he had signed the cheques which had bounced and he had allegedly resigned or retired after the cheques were dishonoured. Taking the complaint at its face value, the allegation is that despite receipt of the notice dated 12.11.1997, "the accused", meaning company and the petitioner, failed to

make payment and that that failure was mala fide, intentional, deliberate and with the knowledge since the time the cheques were issued that the cheques would meet the fate of dishonour. It is held by the Madras High Court in HABIBUNNISA AKTHAR v. S & S INDUSTRIES AND ENTEERPRISES LTD. [(1995) 83 COMPANY CASES 593], that whether the allegations made in the complaint were true or whether the extract from the Registrar of Firms indicating the accused not to be a partner reflected the real state of affairs were matters which could be gone into only when evidence in that regard was let in and which could come only at the stage of trial.

7. In the present case, prima facie, the petitioner having signed the cheques as a director, he has to be taken to be in charge of and responsible to the company in the conduct of its business and it would be a matter of evidence where that prima facie presumption will have to be substantiated and it would be for the petitioner to prove before the trial Court that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence, if that be his defence. But his defence of having already retired or resigned from the directorship at the time of expiry of 15 days after receipt of the demand notice can neither be considered at this stage for quashing the complaint against him nor can it be presumed to be an available defence unless it is proved to be falling within the four corners of the proviso to

sub-section (1) of Section 141. Under the scheme of Section 141 (1), if it is only proved by the prosecution that the accused person was in charge of and responsible to the company in the conduct of its business at any stage of commission of the offence and the accused fails to prove his ignoranced or exercise of due diligence to prevent the commission of the offence, then, by virtue of the deeming fiction, he has to be deemed to be guilty of the offence.

8. In the above facts and circumstances, no case having been made out to quash the complaint, or for setting aside the issuance of process against the petitioner in Criminal Complaint No.6690 of 1997 pending in the Court of the learned Judicial Magistrate, First Class, Pardi, the petition is summarily dismissed. Direct Service permitted.

Sd/-

(D.H.Waghela,J.)

(KMG Thilake)

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